

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ITV DIRECT, INC.,)
v.)
HEALTHY SOLUTIONS, L.L.C., et al.,)
CAPPSEALS, INC.,)
v.)
HEALTHY SOLUTIONS, L.L.C., d/b/a)
DIRECT BUSINESS CONCEPTS; ITV)
DIRECT, INC.; DIRECT FULFILLMENT,)
LLC, DIRECT MARKETING CONCEPTS,)
INC., DONALD BARRETT, and ROBERT)
MAIHOS,)
Intervenor-Defendants.)

Civil Action No. 04 CV 10421 JLT

AMENDMENTS TO CAPPSEALS' COMPLAINT-IN-INTERVENTION¹

Plaintiff-in-Intervention, Cappseals, Inc. ("Cappseals") hereby incorporates by reference all of the facts, allegations, and statements made within its original complaint-in-intervention (the "Complaint") (Docket #9) as if fully set forth herein. As amendments to its Complaint Cappseals alleges and states as follows:

¹ Because Cappseals has already obtained a judgment (Docket #140) against defendants-in-intervention, ITV Direct, Inc. and Direct Fulfillment, LLC, many of the allegations in its original Complaint were dated. Accordingly, the present pleading primarily includes an identification of the additional allegations and additional counts/causes of action that are hereby added to Cappseals' claims for the purposes of addressing alleged fraudulent conveyances and corporate separation issues in an effort to satisfy Cappseals judgment.

I. PARTIES AND JURISDICTION

1. Cappseals is and was at all relevant times a Washington corporation with its principal place of business in Vancouver, Washington.
2. Defendant Healthy Solutions, LLC., d/b/a Direct Business Concepts (“DBC”), is and was at all material times a California limited liability company with its principal place of business in San Diego, California.
3. Defendant ITV Direct, Inc. (“ITV Direct”) is and was at all relevant times a Massachusetts corporation with its principal place of business in Beverly, Massachusetts.
4. Defendant Direct Fulfillment, LLC (“Direct Fulfillment”) is and was at all relevant times a Massachusetts limited liability company with its principal place of business in Beverly, Massachusetts. On information and belief, Direct Fulfillment is related to ITV Direct and serves as a warehousing facility for ITV Direct.²
5. Defendant Direct Marketing Concepts, Inc. (“DMC”) is and was at all times a Massachusetts corporation with its principal place of business in Beverly, Massachusetts. On information and belief, DMC shares the same officers, directors and shareholders as ITV Direct.
6. Defendant Donald Barrett is a resident of Massachusetts and is the President and a Director of both ITV Direct and DMC. Mr. Barrett also owns 50% of both companies.
7. Defendant Robert Maihos is a resident of Massachusetts and is the Treasurer, Secretary and a Director of both ITV Direct and DMC. Mr. Maihos also owns the remaining 50% of both companies.

8. Jurisdiction is proper in this Court pursuant to 28 U.S.C. 1332 because there is diversity among the parties and the amount in controversy exceeds \$75,000.

9. Venue is proper in this Court pursuant to 28 U.S.C. 1391(a) (1-3) because defendants ITV Direct and Direct Fulfillment are Massachusetts corporations and have as their principal place of business Massachusetts and Massachusetts is where a substantial part of the events giving rise to claim occurred.

II. ADDITIONAL FACTS

The ITV Parties' Debt For The Shipments Received.

10. In early April 2003, ITV Direct and DBC entered into a distribution agreement (the "Distribution Agreement") by which ITV Direct was to produce an infomercial for the purpose of marketing a health supplement developed by Healthy Solutions called Supreme Greens (the "Product").

11. DBC sold ITV Direct 303,643, bottles of the Product all of which were manufactured and shipped by Cappseals.

12. The 303,643 bottles were made up of six separate shipments placed in response to a "standing" purchase order ("Purchase Order 1101") that was issued on November 21, 2003 requesting shipments of 50,000 bottles of the Product per week.

13. Direct Fulfillment received the shipments of the Product pursuant to Purchase Order 1101. ITV Direct and/or Direct Fulfillment were invoiced \$1,821,864.00 – \$890,000 (approx.) of which was owed to Cappseals for the six shipments.

² Cappseals, DBC, ITV Direct and Direct Fulfillment were already parties to this action prior to the present amendments.

14. The Product was thereafter re-sold at a significant profit.
15. After ITV Direct refused to pay the balance owed to DBC for the Product the present action ensued.

Cappseals Judgment Against the ITV Parties.

16. On July 20, 2005 this Court granted Cappseals summary judgment motion and determined – as a matter of law – that ITV Direct was indebted to Cappseals for the six shipments of the Product manufactured by Cappseals. The Court endorsed a judgment in favor of Cappseals (the “Judgment”) having determined that “there is no just reason to further delay payment for goods delivered, accepted and re-sold.”

The ITV Parties Have Co-Mingled Assets with Related Parties and Persons.

17. ITV Direct and Direct Fulfillment have conducted their distribution operations in conjunction with a third related corporate entity, DMC. DMC is a company wholly owned by the principals of ITV Direct, Donald Barrett and Robert Maihos. Additionally, Mr. Barrett and Mr. Maihos hold identical management roles at each company.

18. While Cappseals was directed to ship the Product to Direct Fulfillment pursuant to Purchase Order 1101, at some point in time, “ownership” of the Product inventory was transferred to DMC.

19. ITV Direct and/or Direct Fulfillment received less than reasonably equivalent value for the transfer of the Product inventory to DMC.

20. ITV Direct and Direct Fulfillment by and through its principals, Mr. Barrett and Mr. Maihos, made the transfer with the actual intent to hinder, delay or defraud the creditors of

ITV Direct and Direct Fulfillment.

21. At the time of the transfers, ITV Direct and Direct Fulfillment by and through its principals, Mr. Barrett and Mr. Maihos, intended ITV Direct and Direct Fulfillment to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due.

22. Subsequent to the transfers to DMC, it used the inventory of the Product to generate revenues exceeding \$16 million resulting in an accumulation of millions of dollars in assets.

23. At the same time, any liquid assets ITV Direct generated for its part in the companies' business were transferred to DMC, Mr. Barret and Mr. Maihos, leaving ITV Direct a shell entity with a negative balance sheet and insufficient monies to satisfy the Judgment.

24. Despite their corporate forms and feigned attempts at intra-company transfers, ITV Direct, DMC and Direct Fulfillment have been operated as one single entity.

III. ADDITIONAL COUNTS

EIGHT CLAIM FOR RELIEF

(Fraudulent Transfer, M.G.L. c. 109A, §5: Defendants ITV Direct, Direct Fulfillment, DMC, Donald Barrett and Robert Maihos)

25. Cappseals hereby incorporates by reference all of allegations above and those made within Complaint as if fully set forth herein.

26. ITV Direct and Direct Fulfillment by and through its principals, Donald Barrett and Robert Maihos, made the transfer of the Product inventory or other assets of ITV Direct and

Direct Fulfillment with the actual intent to hinder, delay or defraud the creditors of ITV Direct and Direct Fulfillment or without receiving a reasonably equivalent value in exchange for such transfers.

27. ITV Direct and Direct Fulfillment by and through its principals, Mr. Barrett and Mr. Maihos, intended to incur, or believed or reasonably should have believed that they would incur, debts beyond their ability to pay as they became due.

28. Cappseals may avoid the purported transfers to the extent necessary to satisfy its claims under M.G.L. c. 109A, §8.

29. Cappseals may recover the value of ITV Direct and Direct Fulfillment's right, title and interest in the Product inventory and/or other assets fraudulently transferred to DMC, Donald Barrett or Robert Maihos to the extent necessary to satisfy its Judgment under M.G.L. c. 109A, §8.

NINTH CLAIM FOR RELIEF

(Fraudulent Transfer, M.G.L. c. 109A, § 6: Defendants ITV Direct, Direct Fulfillment, DMC, Donald Barrett and Robert Maihos)

30. Cappseals hereby incorporates by reference all of allegations above and those made within Complaint as if fully set forth herein.

31. ITV Direct and Direct Fulfillment by and through its principals, Donald Barrett and Robert Maihos, made the transfer of the Product inventory or other assets of ITV Direct or Direct Fulfillment without receiving a reasonably equivalent value for such transfers.

32. ITV Direct and Direct Fulfillment were insolvent at the time of the purported

transfers or became insolvent as a result of the purported transfers.

33. At the time of the transfers, the claims of DBC, Cappseals and/or other creditors of ITV Direct and Direct Fulfillment had arisen and remained unpaid.

34. Cappseals may avoid the purported transfers to the extent necessary to satisfy its claims under M.G.L. c. 109A, §8.

35. Cappseals may recover the value of ITV Direct and Direct Fulfillment's right, title and interest in the Product inventory or other assets fraudulently transferred to DMC, Donald Barrett or Robert Maihos to the extent necessary to satisfy its Judgment under M.G.L. c. 109A, §8.

TENTH CLAIM FOR RELIEF

(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)

36. Cappseals hereby incorporates by reference all of allegations above and those made within Complaint as if fully set forth herein.

37. The allegations recited above constitute an actual controversy within this Court's jurisdiction.

38. Cappseals is an interested parties to this controversy.

39. Cappseals requests that the Court declare that ITV Direct and Direct Fulfillment fraudulently transferred assets to DMC and its principals, Donald Barrett and Robert Maihos with the intent to hinder, delay or defraud Cappseals and other creditors of ITV Direct and Direct Fulfillment.

40. Cappseals requests that the Court declare that the fraudulent transfers of assets from ITV Direct and Direct Fulfillment to DMC, Donald Barrett and Robert Maihos are void.

41. Cappseals requests that the Court declare that DMC is obligated to pay any debts, obligations and/or judgments that have been or will be issued against ITV Direct and Direct Fulfillment and in favor of Cappseals as a result of their failure to operate ITV Direct, Direct Fulfillment and DMC as separate corporate entities.

ELEVENTH CLAIM FOR RELIEF

(Constructive Trust Upon Assets of DMC, Donald Barrett and Robert Maihos)

42. Cappseals hereby incorporates by reference all of allegations above and those made within Complaint as if fully set forth herein.

43. DMC, Donald Barrett and Robert Maihos have been unjustly enriched by obtaining the right, title and interest in the assets of ITV Direct and Direct Fulfillment without paying fair value for such assets.

44. A constructive trust should be imposed over any and all of DMC, Donald Barrett and Robert Maihos' goods, receivables, or proceeds arising out of the transfers made to them by ITV Direct and Direct Fulfillment.

45. This constructive trust is held by DMC, Donald Barrett and Robert Maihos for the benefit of ITV Direct, Direct Fulfillment and their creditors.

TWELTH CLAIM FOR RELIEF

(Reach and Apply)

46. Cappseals hereby incorporates by reference all of allegations above and those

made within Complaint as if fully set forth herein.

47. By virtue of their positions as officers and directors, Donald Barrett and Robert Maihos owed fiduciary duties to ITV Direct, Direct Fulfillment the Debtor and their creditors, including the duty to use due care, diligence and skill in managing the affairs of ITV Direct and Direct Fulfillment.

48. By virtue of their positions as directors or officers, Donald Barrett and Robert Maihos owed fiduciary duties to ITV Direct and Direct Fulfillment, including the duty of loyalty not to waste, divert and/or convert corporate assets to their own use and benefit.

49. As heretofore alleged, Donald Barrett and Robert Maihos breached their fiduciary duties to ITV Direct, Direct Fulfillment and their creditors.

50. As a direct and proximate result of the breaches of fiduciary duties, ITV Direct, Direct Fulfillment and their creditors have suffered substantial economic damage.

THIRTEENTH CLAIM FOR RELIEF

(Alter Ego)

51. Cappseals hereby incorporates by reference all of allegations above and those made within Complaint as if fully set forth herein.

52. ITV Direct, Direct Fulfillment and DMC share the same directors and officers.

53. ITV Direct, Direct Fulfillment and DMC are all wholly owned, controlled and directed by Donald Barrett and Robert Maihos

54. ITV Direct, Direct Fulfillment and DMC do not operate as independent entities.

55. Upon information and belief, ITV Direct and Direct Fulfillment were intentionally created and have been operated as corporations with insufficient monies to satisfy any judgment against them and to create a layer between DMC, Donald Barrett, Robert Maihos and their respective creditors.

56. ITV Direct, Direct Fulfillment and DMC are alter egos and are not separate entities.

57. DMC is, therefore, bound by any obligation incurred by ITV Direct or Direct Fulfillment.

58. Honoring the corporate separateness of ITV Direct, Direct Fulfillment and DMC will promote fraud, create injustice and inflict gross inequity by shielding the corporate defendants from liability for the Judgment and other amounts that may be due to Cappseals.

WHEREFORE, in addition to the relief requested in the Complaint, Cappseals prays for relief against the defendants-in-intervention as follows:

- (1) A declaration that ITV Direct and Direct Fulfillment fraudulently transferred assets to DMC and its principals, Donald Barrett and Robert Maihos with the intent to hinder, delay or defraud Cappseals and other creditors of ITV Direct and Direct Fulfillment;
- (2) A Declaration that the fraudulent transfers of assets from ITV Direct and Direct Fulfillment to DMC, Donald Barrett and Robert Maihos are void;
- (3) An Order requiring DMC, Donald Barrett and Robert Maihos to transfer to ITV Direct all assets obtained through such fraudulent transfers;
- (4) A declaration that ITV Direct, Direct Fulfillment and DMC are alter egos and are not separate entities;
- (5) A declaration that DMC is obligated to pay any debts, obligations and/or judgments that have been or will be issued against ITV Direct and Direct Fulfillment and in favor of Cappseals;

- (6) Judgment against DMC, Donald Barrett and Robert Maihos in the principal sum of \$890,182.09, together with interest thereon at the statutory rate, and continuing to accrue thereafter until paid in full, plus Cappseals' costs and disbursements incurred herein;
- (7) Judgment against Donald Barrett and Robert Maihos and in favor of ITV Direct, Direct Fulfillment and DMC in an amount to be determined at trial for the damages caused by said individuals misconduct, breach of their fiduciary duties to said companies in mismanaging their affairs, and, the excessive compensation they received from said companies;
- (8) Order the imposition of a constructive trust over any and all of DMC's goods, receivables, or proceeds arising out of the sale of the Product, and that this constructive trust is held by for the benefit of Cappseals;
- (9) Find for Cappseals on all Counts stated herein and within the Complaint;
- (10) Find against the defendants-in-counterclaim; and
- (11) Award of such other and further relief as the Court deems equitable and just.

Cappseals, Inc.
By its attorneys,

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